No. 52670-1-2

WASHINGTON STATE COURT OF APPEALS DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

XAVIER MICHAEL MAGANA,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY
The Honorable Frank E. Cuthbertson, Judge

REPLY TO BRIEF OF RESPONDENT

Xavier Michael Magana, DOC#348190
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA. 98520

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A. ARGUMENT

I.)TIMELINESS

The State absurdly asserts that "this court properly denied Defendant's untimely motion where it was filed five years after the one year time-bar". Response @ 3. However, RCW 10.73.090 is inapplicable for multiple reasons: 1.)All but one motion that was denied are not governed under CrR 7.8, rather they are mere requests for materials mandated under Brady v. Maryland, 373 U.S. 83(1963) and RPC 3.8(d); 2.)The single motion that was governed under CrR 7.8 was denied on the merits, effectively removing any state procedural bars. "If the superior court retains a postconviction motion and denies it on the merits, the defendant has a right to direct appeal. RAP 2.2(a)(10)." In re Ruiz-Sanabria, No. 90712-9(2015).

The State further embelishes, arguing that "neither the supreme court nor the court of appeals may grant relief on a petition that is time barred. See RAP 16.4(d)." Response @ 4. Appellant(emphasis added) is not a petitioner, nor is the current cause of action a petition. This is a direct appeal, deriving from the Pierce County Superior Court exercising their discretion and electing to deny Appellant's motio-

ns on the merits. Ruiz-Sanabria, supra.

The orders, to which this direct appeal derives, effectively destroyed the finality of Appellant's Judgement and Sentence. "[O]nly if the trial court....exercised its independent judgement, reviewed and ruled again on such issue does it become an appealable question." State v. Barberio, 121 Wn.2d 48(1993); Ruiz-Sanabria, supra. In essence, the one year time-bar for purposes of RCW 10.73.090 begins the date a mandate is issued following this direct appeal. Thus, all issues raised herein are timely filed In re Skylstad, 160 Wn.2d 944(2007). See Also: State v. Siglea, 196 Wash. 283(1938)("A prerequisite to an appeal in a case, there must be a final judgement terminating the prosecution of the accused and disposing of all matters submitted to the court for its consideration and determination.); Burton v. Stewart, 549 U.S. 147, 156-57(2007)("A judgement and sentence becomes final for purposes of 28 USC §2254(d) when both the conviction and sentence become final."); United States v. Colvin, 204 F.3d 1221, 1224 (9th cir. 2000)("The key inquiry is whether the district court's entry of the amended judgement could have been appealed ."). An order that is subject to direct appeal will alter the finali-

ty of a judgement, but an order that is purely ministerial and is not subject to a renewed appeal does not affect the finality of the previously entered judgement and sentence. Burrell v. United States, 476 F.3d 160, 169(2d cir. 2006); United States v. Dodson, 291 F.3d 268, 275(4th cir. 2002).

The issue therefore is whether Appellant was entitled to this direct appeal as a matter of right, which is an affirmative. Accordingly, The Pierce County Superior Court orders to which this direct appeal derives did affect the finality of His case, and the Judgement and Sentence is not yet final for purposes of RCW 10. 73.090, deeming all causes of action herein timely.

II)CONTINUED OBLIGATION TO DISCLOSE

The State conviently misonstrues the extent of requested Brady v. Maryland materials. "The defendant is not entitled to ongoing discovery post-conviction from The State. id. Because CrR 4.7 does not apply to post conviction proceedings, the trial court did not err by denying his motion to compel post-trial discovery and/or hold an evidentiary hearing." Response @ 7.

The question presented to this court, by App-

ellant, is: "Does The State have an obligation to disclose mitigating evidence and exculpatory evidence?" In accord with Brady v. MAryland, supra; Kyles v. Whitley, 514 U.S. 419(1995); Ashley v. Texas, 319 F.2d 80(5th cir. 1963); USC Amend. V, VI, and XIV; and ABA Model Rules Of Prof'l Conduct 3.8, the answer is yes. Opening Brief @ 5-9.

Appellant's requests allege specific connections to legal theories advanced, which tend to negate The State's probable cause and 'theory of the case'; evidencing probative relationship between the Brady materials being withheld and relief entitled as a matter of right.

Due Process requires The State to disclose "evidence that is both favorable to the accused and material either to guilt or punishment." United States v. Bagley, 473 U.S. 667, 674(1985)(quoting Brady v. Maryland, supra.). There is no Brady violation, however, "If the defendant using due diligence, could have obtained the information" at issue. In re Benn, 134 Wn.2d 868(1998).

Evidence is 'material' and therefore must be disclosed under Brady "only if 'there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the

proceeding would have been different." United States v. Bagley, 473 U.S. at 682; Benn, 134 Wn.2d at 916. In applying this "reasonable probability" standard, , the "question is not whether the defendant would have more likely than not have recieved a different verdict with the evidence, but whether in its absence he recieved a fair trial, understood as a trial resulting in a verdict worthy of confidence." Kyles v. Whitley, 514 U.S. 419, 434(1995); Benn, 134 Wn.2d at 916. "A 'reasonable probability' of a different result is shown when the government's evidentiray suppression 'undermines confidence in the outcome of trial.'" id. (quoting Bagley, supra).

The State relies on Gentry, in justification for the withholding of requested Brady material. This premise is flawed in several aspects: 1.)Brady v. Maryland takes precedent as a U.S. Supreme Court ruling, the supreme law of the land(U.S.C. Art. IV, cl. 2); 2.)RPC 3.8(d) mandates the disclosure; and 3.)The State's interpretation and reliance on Gentry is misplaced.

Gentry was filing a PRP, where as Appellant is on direct review-the procedural posture standard for review has shifted in favor of App-

ellant. Moreso, Gentry involved questionably impeaching materials and conspiracy theories; newly submitted evidence by Gentry. The instant case very specifically pertains to Brady materials in The State's possession, and since The State remains in possession of the materials requested, specifically but not limited to the GPS coordinates and witness statements written in the spanish language, it is "Brady material".

III.)DENIAL OF MOTIONS LACKING JUSTIFICATION

The State falsely claims: "The defendant cites to Beers v. Ross, in support of his claim ....his reliance on Beers is misplaced....this was a civil case which has absolutely no bearing on whether a trial court needs to provide a reason when denying a postconviction claim for relief. Where the trial court is not required to provide a reason for denying the defendant's post conviction motion for relief...." Response @ 11. This reading of the law is ridiculously misconstrued.

The Beers v. Ross court explicitly states "the trial court erred when it denied the Beers' motion for no apparent reason. See State v. Hampton, 107 Wn.2d 403(1986)("We cannot say

[the trial court] based its decision on tenable grounds for reasons" when it did not provide any reasons for its decision".). In which State v. Hampton is a criminal case holding: "Here, the trial court gave no reasons at all. In refusing to vacate a bail forfeiture the trial court must state its reasons for doing so in order for an appellate court to determine whether there was an abuse of discretion. Because the trial court did not provide any reasons for its decision, we cannot say it based on tenable grounds or reasons. We hold the trial court abused its discretion."

"All motions that were denied and thus predicate to this appeal are clear indications of the trial court abusing its discretion." Opening brief @ 18. "A trial court abuses its discretion when its exercise of discretion is manifestly unreasonable or based on untenable grounds or reasons." Davis v. Globe Mach. Mfg. Co., 102 Wn.2d 68(1984); State v. olsen, 127 Wash. 300(1923), aff'd, 130 Wash. 708(1924).

Additionally, Respondent neglects responding to Appellant's 14th amendment due process claim, in regards to Appellant's federalization of the issue. Opening Brief @ 18.

IV.)BLAKELY VIOLATION

The State complains that "because petitioner's sentence was within the standard range for his offense, petitioner fails to show in this claim that his judgement and sentence is invalid on its face." Response @ 12. Yet cites no authority for this challenge to an illegal sentence outside the standard range. "If a party fails to support argument with citation to legal authority, the court is entitled to presume that none exists. Oregon Mut. Ins. Co. v. Barton, 109 Wn. App. 405, 218(2001).

Appellant, on the other hand, makes clear in His Opening Brief, of the illegalities, in violation of Apprendi v. New jersey, 520 U.S. 466(2000); Blakely v. Washington, 542 U.S. 296 (2004); State v. Evans, 154 Wn.2d 438(2005); State v. Hughes, No. 74147-6(2004); State v. Alvarado, 81069-9(2008). Opening Brief @ 20-21 Where His 36 months community custody and 333 months of confinement, combined exceed the 333 month 'relevant statutory maximum'.

B.CONCLUSION

Based upon Appellant's arguments set forth in His 'Opening Brief', in conjunction with this RESPONSE, Appellant request this court

grant relief(s) applicable.

SIGNED and DATED this 26th day of January, 2020.

Respectfully Submitted,

Xavier Magana/Appellant

DECLARATION OF SERVICE BY MAIL

I, Xavier Michael Magana, declare and say:

That on the 29 day of January, 2020, I depositted the following documents in The Stafford Creek Corrections Center 'Legal Mail' system, by First Class pre-paid postage, under Court Of Appeals Case Number, 52670-1-II;

1.)"MOTION FOR DISCRETIONARY REVIEW(13.5)".

Addressed to the following:

1.)Court Of Appeals Division Two, ATTN! David Ponzoha, 950 Broadway, Suite#300, Tacoma, WA. 98402;
2.)Pierce County Prosecuting Attorney, ATTN! Kristie Barham, 930 Tacoma Avenue South, RM# 946, Tacoma, WA. 98402.
3.)Washington State Supreme Court, ATTN! Susan L. Carlson, P.O. Box 40929, Olympia, WA. 98504-0929

I declare under penalty of perjury under the laws of The State Of Washington that the foregoing is true and correct.

SIGNED and DATED this 29 day of January, 2020, in the city of Aberdeen, county of Grays Harbor, State Of Washington.

Xavier Michael Magana, DOC#348190
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191 Constantine Way
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